No. 84-262

IN THE

Supreme Court of the United States

October Term, 1984

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
Petitioner,

v.

PUEBLO OF SANTA ANA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE STATE OF NEW MEXICO IN SUPPORT OF MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY

PAUL BARDACKE
Attorney General of New Mexico

CHARLOTTE URAM
BRUCE THOMPSON
Assistant Attorneys General
Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827-6000

HUGH W. PARRY
Special Assistant Attorney General
New Mexico State Highway Dept.

Attorneys for the State of New Mexico, amicus curiae

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The State of New Mexico files this brief *amicus curiae* in support of Mountain States Telephone and Telegraph Company pursuant to Rule 36 of the Supreme Court Rules.

STATEMENT OF INTEREST

The State of New Mexico acquired one right-of-way from the Sandia Pueblo pursuant to Section 17 of the Pueblo Lands Act of June 7, 1924, 43 Stat. 636 ("Section 17"), and a second right-of-way from the Santa Ana Pueblo, apparently pursuant to Section 17. The State acquired these rights-of-way to construct United States Highway 85, a Federal Aid Primary Highway. *See,* 23 U.S.C. §§ 103-157. U.S. 85 is a major highway paralleling Interstate 25, providing access to land near the Interstate. Prior to the construction of Interstate 25, U.S. 85 was the principal north-south highway connecting New Mexico's largest city, Albuquerque, to the capital in Santa Fe. The State rights-of-way acquired across the Santa Ana and Sandia Pueblos were approved by the Secretary of the Interior on March 13, 1926 and March 29, 1928, respectively.

If this Court holds that rights-of-way acquired by Mountain States pursuant to Section 17 are invalid, the State faces the possibility of losing its existing rights-of-way. The Sandia Pueblo has already sued the State of New Mexico seeking to eject the State from 8 miles of U.S. 85 and to recover trespass damages of $150,000. The Sandia Pueblo cited the District Court's decision in the present case as the basis for the ejectment action. *Pueblo of Sandia v. New Mexico Highway Commission, et al.*, No. 82-1522C (D.N.M., filed June 13, 1983). That case is in abeyance pending the decision of this Court. The State has already had to delay needed road resurfacing work on U.S. 85 because of pending litigation over its rights-of-way.

If the Court rules for the Pueblo, the State may find itself with a multimillion dollar highway leading up to and out of these Pueblos and no right-of-way connecting these highways. The State would have to negotiate a reasonable settlement to re-acquire the highway built across the Pueblos which may not be possible.

SUMMARY OF ARGUMENT

Section 17 of the Pueblo Lands Act was passed at a time when Congress' policy toward Indians was to attempt to assimilate Indians into the non-Indian society. Section 17, which in part allowed voluntary transfers of Pueblo lands subject to the approval of the Secretary of the Interior, was consistent with the policies of the time. Many entities, including the State of New Mexico, purchased rights-of-way in good faith from the Pueblos. Those purchases were approved by the Secretary based on the clear language of Section 17. The validity of those rights-of-way should be upheld.

ARGUMENT

IN LIGHT OF THE PLAIN LANGUAGE OF SECTION 17, THE HISTORY OF THE ASSIMILATIONIST PERIOD DURING WHICH THE STATUTE WAS PASSED, AND THE CONTEMPORANEOUS AND LONG-STANDING ADMINISTRATIVE INTERPRETATION OF THE STATUTE, THE CORRECT INTERPRETATION OF SECTION 17 OF THE PUEBLO LANDS ACT IS THAT IT ALLOWED PUEBLO INDIANS TO CONVEY LANDS VOLUNTARILY, SUBJECT TO THE APPROVAL OF THE SECRETARY OF THE INTERIOR.

Section 17 of the Pueblo Lands Act provides:

> No right, title, or interest in or to the lands of the Pueblo Indians of New Mexico to which their title has not been extinguished as hereinbefore determined shall not hereafter be acquired or initiated by virtue of the laws of the State of New Mexico, or in any other manner except as may hereafter be provided by Congress, and no sale, grant, lease of any character, or other conveyance of lands, or any title or claim thereto,

> made by any Pueblo as a community, or any Pueblo Indian living in a community of Pueblo Indians, in the State of New Mexico, shall be of any validity in law or in equity unless the same be first approved by the Secretary of the Interior.

This statute on its face has two parts. The first provides for involuntary transfers of Pueblo land. The second provides for voluntary transfers of Pueblo land. Under the first part of Section 17 one may not acquire lands from a Pueblo without an act of Congress. The second part of Section 17 is an act of Congress validating voluntary transfers of Pueblo land by sale, grant, lease or conveyance if approved by the Secretary of the Interior.

The Pueblo of Santa Ana places a different interpretation on Section 17. The Pueblo interprets Section 17 to prohibit all transfers of Pueblo lands unless Congress has approved the method for such transfer. The second portion of Section 17 is claimed by the Pueblo to place an additional restriction on any congressionally approved transfer of Pueblo land. Any transfer of Pueblo land pursuant to an act of Congress would be invalid unless approved by the Secretary of the Interior. Brief of Respondent in Opposition to Petition for Certiorari at 13-14. Under the Pueblo's interpretation of Section 17, an act of Congress transferring Pueblo lands would be without effect unless approved by the Secretary of the Interior.

There is no reason to believe Congress intended to limit its future legislative authority to deal with the Pueblo Indians by allowing the Secretary of the Interior to approve or disapprove congressional action. Furthermore, if in enacting Section 17, Congress only wanted to preclude all future transfers of Pueblo lands except as approved by Congress, there was no need for the second half of Section 17. Statutes should be read to give effect to all parts of the statute. *McDonald v. Thompson*, 305

U.S. 263, 266 (1938). The only interpretation of Section 17 that gives effect to all parts of the statute is one which interprets the second half of Section 17 to allow voluntary transfers subject to Secretarial approval.

The interpretation of Section 17 that follows from the clear statutory language is the interpretation used consistently by the United States since the statute's enactment. The Bureau of Indian Affairs' administrative use of this interpretation is well documented by Mountain States. Long-standing administrative interpretations are entitled to deference.[1] *Udall v. Tallman*, 380 U.S. 1, 16 (1965). As recently as June 2, 1982, the date of the District Court decision in this case, the Solicitor's Office of the Department of the Interior refused to prosecute trespass claims on behalf of the Pueblos based on rights-of-way acquired pursuant to Section 17. *Covelo Indian Community v. Watt*, 551 F.Supp. 366, 374 (D.D.C. 1982).

Not only the language of Section 17 and the long-standing administrative interpretation but also history supports the interpretation that Section 17 was intended to allow voluntary transfers of Pueblo land. The 1924 Pueblo Lands Act was adopted during a period when the United States was attempting to break up reservations and bring Indians into the mainstream of American life. The years 1887 through 1928 are recognized as the period of assimilation. *Felix Cohen's Handbook of Federal Indian Law* (1982 ed.) pp. 127-134. Placing Section 17 in the context of assimilation shows that the interpretation advanced by Mountain States is consistent with the then-existing

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[1] The Tenth Circuit, without specifically stating that the administrative construction of Section 17 by the agency charged with administering the Act was to allow voluntary transfers, did determine that it would not give any weight to the B.I.A.'s construction because that construction was contrary to what the Tenth Circuit felt was clear language contrary to the interpretation of the B.I.A.

congressional policy. To assert that federal policy toward Indians has always been one of protecting Indian possessory rights and that Section 17 extended and confirmed this policy to the Pueblos is to misunderstand the assimilation period.[2]

The General Allotment Act of 1887, ch. 119, 24 Stat. 388 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, and 381), marked the beginning of the period of assimilation. Reservations were partitioned by the President and individual allotments given to tribal members. 25 U.S.C. § 331. Allotments were held in trust by the United States for the individual Indians during a period of incompetency and then patented by the United States in fee to the individual Indian who was then free to alienate the land. 25 U.S.C. § 348.

The practice of issuing allotments and subsequent fee patents was not ended by Congress until the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. §§ 461-479). Congressional policy under the General Allotment Act, which was in effect in 1924 at the time of the enactment of Section 17, was clearly one of allowing reservation land to pass out of tribal control. *Solem v. Bartlett*, __U.S.__, 104 S.Ct. 1161, 1164 (1984); *Montana v. United States*, 450 U.S. 544, 559 n.9 (1981).

The interpretation of Section 17 advanced by Mountain States Telephone and Telegraph, which would allow Pueblos to voluntarily transfer their land subject to the approval of the Secretary of the Interior, is consistent with the assimilationist

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[2] The Indian Non-Intercourse Act 25 U.S.C. § 177, which has been made applicable to the Pueblos, *United States v. Candelaria*, 271 U.S. 432 (1926), provides that Indian title can only be extinguished by an act of the sovereign. Since the second half of Section 17 represents an act of the sovereign allowing title to be extinguished, it is not in conflict with the Non-Intercourse Act or the policy of that Act.

policies of the time.[3] The interpretation of Mountain States regarding Section 17 is consistent with the plain language of the statute, and long-standing administrative interpretation. Any other interpretation puts into doubt land titles acquired and held in good faith based on conveyances made by the Pueblos and approved by the Secretary of the Interior. Any other interpretation harms those who did not acquire title pursuant to Section 17 but who have relied on the existence of highways, railroads, and utilities built on rights-of-way acquired under the Act.

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[3] The General Allotment Act represents only one manifestation of congressional policy to remove any special status for Indians and Indian land during the period of assimilation. *E.g.*, Appropriations Act of March 3, 1901, ch. 832, § 3, 31 Stat. 1058, 1083-84 (25 U.S.C. §§ 319, 357) (authorizing the Secretary of Interior to grant rights of way across tribal and allotted lands for telephone and telegraph lines and offices and subjecting allotted lands to condemnation pursuant to the law of the state or territory); Appropriations Act of June 30, 1919, ch. 4, § 26, 41 Stat. 3, 32 (codified as amended at 25 U.S.C. § 399) (allowing the Secretary to issue mineral leases on tribal lands without tribal approval); Act of March 3, 1921, ch. 119, § 1, 41 Stat. 1225, 1232 (25 U.S.C. § 393) (allowing lease of allotments subject only to approval of Indian agent, not Secretary). *Amicus* does not contend that all acts of Congress related to Indians during the period 1889 through 1928 were assimilationist. It is clear that Mountain State's interpretation of Section 17 is consistent with Congress' policy toward Indians during the assimilationist period and with the scope of Congress' perceived duties to tribes.

CONCLUSION

Amicus respectfully urges that the decision of the Tenth Circuit be reversed and the case remanded.

Respectfully submitted,

PAUL BARDACKE
Attorney General of New Mexico

CHARLOTTE URAM
BRUCE THOMPSON
Assistant Attorneys General

Post Office Drawer 1508
Santa Fe, New Mexico 87504-1508
(505) 827 -6000

HUGH W. PARRY
Special Assistant Attorney General

New Mexico State Highway Department
P. O . Drawer 1149
Santa Fe, New Mexico 87504-1149

Attorneys for the State of New Mexico, amicus curiae

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